Office-Supreme Court, U.S.
FILED
FEB 13 1967
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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1057

CLIMAX CHEMICAL COMPANY,

Petitioner,

v.

C. F. BRAUN & CO., a corporation;
PENNSALT CHEMICAL CORPORATION, a corporation;
J. T. THORPE, INC., a corporation;
HEYWARD-ROBINSON COMPANY, a partnership;
BERNARD GOODMAN and ALEXANDER SOMMER,
partners composing said partnership;
THERMAL RESEARCH & ENGINEERING CORPORATION, a
corporation; STEPHENS-ADAMSON MFG. CO., a corporation;
STANDARD STEEL CORPORATION, a corporation;
and BEAUMONT BIRCH COMPANY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Climax Chemical Company, prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Tenth Circuit (App. B), which affirmed the order of the United States District Court for the District of New Mexico (App. A), denying plaintiff's motion to remand this action to the District Court of Lea County, New Mexico. The appeal from the interlocutory order of the district court was perfected in accordance with 28 U.S.C. § 1292(b) (App. A, App. D, App. E.).

Opinions Below

A copy of the order of the United States District Court for the District of New Mexico from which the interlocutory appeal was taken is copied herein as Appendix A. The majority opinion of the United States Court of Appeals for the Tenth Circuit affirming the order denying Petitioner's motion to remand is copied herein as Appendix B. The dissenting opinion of Judge Kerr is copied herein as Appendix C. The order of the United States Court of Appeals for the Tenth Circuit allowing the interlocutory appeal on certification and application under 15 U.S.C. § 1292(b) is copied herein as Appendix D. The opinions copied herein as Appendix B and Appendix C have not yet been reported.

Jurisdiction

The order of the United States District Court for the District of New Mexico denying petitioner's motion to remand and certifying the ruling for appeal under 15 U.S.C. § 1292(b) was signed and entered on December 15, 1965 (Tr. 37-39). Petitioner's application for leave to file an interlocutory appeal was filed in the United States Court of Appeals for the Tenth Circuit and was granted by that court on January 19, 1966 (Tr. 39-40). Petitioner filed its notice of appeal on January 24, 1966 (Tr. 40), and thereafter duly perfected such appeal. The opinion and order of the United States Court of Appeals for the Tenth Circuit affirming the order of the district court was filed on December 29, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Whether in the absence of total diversity of citizenship a state court action against a single defendant for the entire damages resulting from faulty engineering and design and faulty equipment rendering plaintiff's chemical plant totally inoperable and against the other defendants for the portion of the total damages for which each is alleged to be responsible is properly removable to the United States District Court under 28 U.S.C. § 1441(c) as involving separate and independent claims or causes of action.

(2) Whether 28 U.S.C. § 1441(c) when construed to permit removal of this action from the state court to the federal court in the absence of complete diversity of citizenship between the plaintiff and the defendants contravenes the provisions of the United States Constitution limiting the jurisdiction of federal courts.

(3) Whether a removal bond executed by a single defendant as principal and its surety company is sufficient to constitute a removal bond for all defendants under 28 U.S.C. § 1446(d) when the other defendants filed separate instruments purporting to join in the bond during the statutory period but the surety executed no agreement to their addition to its bond as additional principals until long after the expiration of the statutory period.

STATUTES INVOLVED

28 U.S.C. § 1441(c):

> "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

Article III, Section 2 of the Constitution of the United States:

> "Section 2. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

28 U.S.C. § 1446(b):

> "The petition for removal of a civil action or proceeding shall be filed within 20 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 20 days after the service of summons upon the defendant if such initial pleading has been then filed in court and is not required to be served on the defendant, whichever period is shorter."

28 U.S.C. § 1446(d):

> "Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed."

Statement of the Case

Petitioner brought this action against respondents C. F. Braun & Co., et al, in the District Court, Fifth Judicial District, Lea County, New Mexico, seeking recovery of $3,600,000 from the respondent Braun as the total damages and seeking recovery from the other respondents of portions of such total damages suffered by petitioner because of defective design and defective engineering of a salt cake and muriatic acid plant designed and engineered by Braun for Petitioner in Lea County, New Mexico, and because of the purchase by Braun, for Climax, from the other respondents of equipment defectively designed or engineered by them for such plant (Tr. 4-25).[1] Respondent Braun by written contract guaranteed that the plant when constructed as designed and engineered would produce and process 100 tons of salt cake and 150 tons of muriatic acid per day. Because of such defective design, defective engineering, and defectively designed and engineered equipment purchased by Braun for Climax from the other respondents, the plant when completed was inoperable and incapable of producing either salt cake or muriatic acid in any commercial quantities (Tr. 7). Respondent Braun by purchase order or subcontract delegated to the other respondents the furnishing of certain of the design and engineering services and the furnishing of certain of the engineered equipment constituting integral parts of the single plant project. Each of such other respondents is sued for a part but not all of the total damages occurring as a consequence of a single injury suffered by petitioner, i.e., a completed plant that would not function or produce the intended products in any commercial quantity. In all instances the other respondents are sued for that part of the total

[1] All references herein to Tr. are to the printed Transcript of Record in the United States Court of Appeals.

damages attributable in each case to the defective design, defective engineering, or the furnishing of defectively engineered equipment by the particular respondent (Tr. 11).

Complete diversity of citizenship between petitioner and respondents does not exist because petitioner and respondent Thermal Research and Engineering Corporation are both incorporated under the laws of the State of Delaware (Tr. 4, 33). However, the respondent Stephens-Adamson Mfg. Co., filed its petition for removal executed by it alone in the United States District Court for the District of New Mexico along with a removal bond executed by it alone as principal and by Western Surety Co. as surety (Tr. 25-29), the removal being predicated on claimed diversity of citizenship, and five days thereafter Stephens-Adamson Mfg. Co. filed its amended petition for removal, executed by it alone, alleging as grounds the requisite jurisdictional amount and diversity of citizenship between all respondents and petitioner or, in the alternative, that there were separate and independent claims or causes of action entitling Stephens-Adamson Mfg. Co. to remove under 28 U.S.C. § 1441(c) (Tr. 29). Within 20 days after service of process upon them, each of the other respondents separately filed a so-called "joinder in removal proceedings", reciting in each instance that each such respondent "accepts and agrees to all the terms and conditions of the petition for removal and amended petition for removal and agrees to be bound by the removal bond which has been filed in this cause, the same as if this defendant had signed such bond in the first instance" (Tr. 32-33). However, none of the other respondents either filed its own separate removal bond or signed the bond previously filed by Stephens-Adamson Mfg. Co., as principal, and Western Surety Company, as surety. The surety on the removal bond of Stephens-Adamson Mfg. Co.

executed no written consent or agreement to the other respondents becoming principals on the removal bond on which it was surety, nor did it in any manner ratify the purported joinder of such other respondents as principals on such bond.

Petitioner filed its motion to remand including the grounds that no respondent except Stephens-Adamson had filed a removal bond as required by 28 U.S.C. § 1446(d) and that the cause of action sued upon is not separate or independent in the case of any respondent, but rather there is a single cause of action and each respondent is jointly and severally liable thereon for a part of the total damages flowing from a single injury (Tr. 34). The District Court denied petitioner's motion to remand but certified such ruling for interlocutory appeal in accordance with § 1292(b) of Title 28, United States Code (Tr. 37). The respondents who failed to file removal bonds subsequent to the hearing on the motion to remand under leave granted by the District Court in denying such motion executed and attached a rider to the removal bond of Stephens-Adamson in which the surety joined (Tr. 36-39). This rider, which only purports to be effective as of the date of its execution, was executed and filed long after the expiration of the statutory period for filing the petition and bond for removal (Tr. 36). Petitioner filed its application to appeal under § 1292(b), Title 28, United States Code, within the time provided by law and the United States Court of Appeals for the Tenth Circuit granted such application (App. D). Thereafter, Petitioner duly perfected the appeal (App. E). The majority of the United States Court of Appeals affirmed the order of the district court denying the motion to remand (App.), with Judge Kerr dissenting (App. C).

Reasons For Granting The Writ

I.

The Decision On Separate And Independent Causes Of Action Conflicts, At Least In Principle, With Prior Decisions Of The United States Supreme Court.

The $3,600,000 total damages for which the respondent Braun is sued *includes the portions thereof for which the other respondents are alleged to be also liable.* The majority opinion of the Court of Appeals holds these portions of the total damage for which the other respondents are also liable to be "separate and independent causes of action" because Respondent Braun placed separate portions of the total work with the other respondents under separate purchase orders or subcontracts, emphasizing "in the light of the dissenting opinion" that each separate respondent had a "separate, independent contract" (App. B, p. 8a). The majority reasoned therefore that the suit against each respondent was "a separate and independent cause of action".

This rationale misapplies and violates the principle of *American Fire & Cas. Co.* v. *Finn,* 341 U.S. 6 (1951). In Finn, the suit was upon "separate and independent" contracts of insurance entered into with separate defendants, but this Court held that the suit was not upon "separate and independent causes of action" under Section 1441(c) which prevented removal in the absence of complete diversity. It was so held even though the primary count in the resident plaintiff's complaint was against a non-resident insurance company defendant alleged to have issued a fire insurance policy covering the plaintiff's property which was destroyed by fire, a second and alternative count was against another non-resident insurance company defendant alleged to have issued another fire insurance policy covering the destroyed property, and the third alternative count was by the resi-

dent plaintiff against the two non-resident insurance company defendants and a resident individual defendant alleged to be the agent of both in which joint and several liability on the part of all three defendants was asserted. These separate contracts and the three separate counts were held not to result in "separate and independent causes of action" within the meaning of Section 1441(c). The fact that the plaintiff Finn sought recovery of total damages against a single defendant in the primary count, total damages against a different single defendant in the second alternative count, and total damages jointly and severally from three defendants in the third alternative count does not distinguish the case in principle from the present case in which the petitioner seeks recovery of total damages from the respondent Braun and seeks judgment against the other respondents for portions but not all of that same damage.

In *Finn* at 341 U.S. 16 the Court emphasized that there was damage from a single fire and that "the facts in each portion of the complaint involved" the individual defendant. Here, there is a single plant and single total damages resulting because that plant was inoperable and incapable of producing the products for which it was intended in any commercial quantities. Here, too, "the facts in each portion of the complaint involved" Braun. All of the respondents contributed integral parts of equipment or services to the single plant and to the single injury, i.e., the inoperable plant, each respondent contributed a portion, although the respondent Braun was liable for the total.

The majority opinion achieves its result of declaring the action as to each respondent "a separate and independent cause of action" by isolating each unit or piece of plant equipment upon which a particular respondent performed services or furnished equipment as a "separate and independent unit" divorced from all of the remainder of the

plant and from the plant as a whole. The majority opinion does so in the following language:

> "In the case at bar it is true that it is alleged that plaintiff's plant would not function, but in no real sense was this a single loss. The plant was composed of a number of separate units. *Obviously, whether one unit, or several, failed to function, the plant could not operate.* The liability of the defendants other than Braun was separate, distinct, and unrelated. With the exception of Braun, no defendant assumed responsibility for other than its own unit, or was liable in any way for the failure of the others." (App. B, p. 9a) (Emphasis Supplied.)

The foregoing statement, particularly the italicized language, constitutes a finding of fact without any evidence having been introduced and is completely without any support in the petitioner's pleadings. It is the theory of the petitioner's complaint that "the plant when completed would not function or operate and could not be put to its intended use of manufacturing salt cake and muriatic acid" (Tr. 8) as the result of the totality of the defaults and defects in engineering, design, and equipment on the part of the respondent Braun and all of the other respondents. Petitioner alleges in paragraph 14 of its complaint (Tr. 8) that the plant "would not produce any commercial quantity of either salt cake or muriatic acid" not only because of the defective design and engineering by the defendant Braun but because of "the engineered equipment as purchased by the defendant Braun". The "engineered equipment" which was defective and which in each instance contributed to the plant failure was purchased from the other respondents.

The allegations of the petitioner's complaint with reference to the defective design, equipping, and construction

of the reactor are to the effect that the Respondents Braun, Pennsalt, Heyward-Robinson, Bernard Goodman, Alexander Sommer, and Thorpe, each and all committed defaults that resulted in the reactor installed in the plant being totally inoperable and worthless (Tr. 12-17). Subsequent allegations of the complaint show that the respondent Thermal, the resident defendant, was guilty of defective and unsound design and construction of a salt preheater and salt evaporator and an air acid heater engineered, designed, and furnished by it for use with this same reactor (Tr. 17-19). Indeed the respondent Thermal designed and furnished all of the heating for the reactor itself and it was defective and insufficient. Subsequent allegations of petitioner's complaint show that the respondent Stephens-Adamson Mfg. Co. engineered, designed, and furnished conveyors to convey salt to and from the preheater designed, engineered, and furnished by Thermal and to convey salt to the reactor and salt cake from the reactor and that such conveyors were totally inoperable and incapable of performing their intended duties (Tr. 19-21). Petitioner's complaint next alleges that respondent Standard Steel Corporation engineered, designed, and furnished a combination rotary dryer-heater "intended to preheat the salt particles before they were conveyed into the reactor" again designed to serve this same reactor and that the same "was not designed and constructed in a good and workmanlike manner and in fact was not fit for the purposes for which it was intended" (Tr. 21-22). Finally, petitioner's complaint alleges that the respondent Beaumont Birch designed and furnished four special rotary valves "required for use in connection with feeding and discharging the reactor" and that these valves furnished to serve this same reactor "were unfit and unusable for such use and became completely inoperative and unusable after a few minutes use" (Tr. 22-23). Petitioner averred not only its reliance upon

the "superior engineering skill and competence" of the respondent Braun but upon that of "its recommended subcontractors and suppliers" (Tr. 24), who were the other respondents.

It is apparent from this summary of the petitioner's pleading, despite the statement quoted from the majority opinion, that while separate purchase orders or subcontracts were issued to each respondent, their equipment and services were so inextricably interrelated and interconnected that the action against them cannot properly be regarded as "separate and independent causes of action" against each of them, but only as a single cause of action based upon a single injury, i.e., an inoperable plant incapable of performing its intended purpose, for all of which the respondent Braun is liable in total damages and to which each other respondent contributed in part and is liable in part. As stated in *Finn* at 341 U.S. 14:

> "In making this determination we look to the plaintiff's pleading, which controls."

In looking to the petitioner's pleading it must be concluded here as in Finn "that where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under Section 1441(c)."

The majority opinion of the Court of Appeals totally ignores the fact that the action is indisputably a single cause of action for total damages against the respondent Braun and that the decisions would not permit splitting this cause of action into a series of separate suits against Braun. *Martin* v. *Broderick,* 177 F. 2d 886 (10th Cir. 1949); *Fidelity and Deposit Co.* v. *Hobbs,* 144 F. 2d 5 (10th Cir. 1944); and *United States* v. *Sinclair Prairie Refining Co.,* 126 F. 2d 827 (10th Cir. 1942). Being a single, inseparable

cause of action against the respondent Braun for the total damages, it necessarily follows that it cannot be split into a series of so-called "separate and independent causes of action" against the other respondents who caused part but not all of the single total injury and who are liable for part but not all of the same total damages.

II.

The Decision Gives No Effect To The Statutory Revisions Made By 28 U.S.C. § 1441(c) And Departs From The "Surer Tests" Contemplated By The Finn Case In Removal Cases.

The majority opinion declares:

> "We take *Finn* to mean that there must be substantive separability, and no more." (App. B, p. 10a).

Finn is so limited and this test is applied despite the repeated emphasis in *Finn* that "separability" has not been the test since September 1, 1948, when 28 U.S.C. § 1441(c) superseded 28 U.S.C. (1946 ed.) § 71. *Finn* emphasizes that an important Congressional purpose "was to limit removal from state courts" and that in the revision made by Section 1441(c) Congress "carried out its purpose to abridge the right of removal" (341 U.S. 10). The effect of Section 1441(c) is then stated at 341 U.S. 11 as follows:

> "A separable controversy is no longer an adequate ground for removal unless it also constitutes a separate and independent claim or cause of action. * * * Congress has authorized removal now under Section 1441(c) only when there is a separate and independent claim or cause of action. Of course, 'separate cause of action' restricts removal more than 'separable controversy'. In a suit covering multiple parties or issues based on a single claim, there may be only one cause of action and yet be separable controversies. The addi-

> tion of the word 'independent' gives emphasis to congressional intention to require more complete disassociation between the federally cognizable proceedings and those cognizable only in state courts before allowing removal."

The majority opinion has given no effect to the revision made in the removal test by Section 1441(c) as enunciated in the *Finn* case. It has permitted removal on the basis of no more than the "separable controversies" rather than requiring "separate and independent causes of action" as delineated in *Finn*.

It should be stated here as it was stated in *Finn* at 341 U.S. 16:

> "The past history of removal of 'separable' controversies, the effort of Congress to create a surer test, and the intention of Congress to restrict the right of removal leads us to the conclusion that separate and independent causes of action are not stated."

III.

The Majority Opinion Of The Court Of Appeals Conflicts, At Least In Principle, With Its Own Prior Decisions And With Decisions Of Other Courts Of Appeals.

Prior decisions of the United States Court of Appeals for the Tenth Circuit clearly delineated the distinction not observed in the majority opinion in the present case between the "separable controversy" which would permit removal under the prior statute and the "separate and independent claim or cause of action" required since September 1, 1948, under 28 U.S.C.A. § 1441.

In *Willoughby* v. *Sinclair Oil & Gas Co.*, 188 F. 2d 902 (10th Cir. 1951), the court held that separate and distinct

acts of negligence on the part of each of the three defendants which all caused or contributed to causing a propane gas explosion which resulted in a single injury were not "separate and independent claims or causes of action", stating at 188 F. 2d 905 that under the statute a single cause of action "may be stated in the alternative, hypothetical or conditional, either in one or separate counts".

In *Snow* v. *Powell,* 189 F. 2d 172 (10th Cir. 1951), the court held that an action against a non-resident defendant whose negligence was alleged to have resulted in a willful assault on the plantiff by the resident defendant did not allege "separate and independent claims or causes of action", stating that while "the complaint charged two wrongs" that such wrongs "coacted to cause a single injury" and that the two wrongs were not independent. The concurring opinion stated that an action against multiple defendants based upon a single injury for which but one recovery was sought could not constitute "separate and independent claims or causes of action" "no matter how many defendants are said to be liable therefor, or how diverse the basis of their liability".

In *Donahue* v. *Warner Bros. Pictures, Inc.,* 194 F. 2d 6 (10th Cir. 1952), the court held that an action against numerous defendants based upon a motion picture film which some defendants produced, other defendants distributed, and still other defendants exhibited in numerous different theaters, did not state separate and independent claims or causes of action because "as pleaded all the defendants joined in such wrong."

In *McLeod* v. *Cities Service Gas Co.,* 233 F. 2d 242 (10th Cir., 1956), the court held that a damage action for injuries to plaintiff's land alleged to have been committed by the nonresident defendant in performing clean-up operations

on the land as a lessee, and by the resident defendant in performing certain work on three wells on the land under contract from the nonresident defendant lessee, did not allege separate and independent claims or causes of action "even though the alleged negligent acts of Miller and those of Cities Service were committed separately and at different times, for they could have concurred to produce one wrong for which they would be jointly or severally liable in one judgment". The court further stated:

> "At most the contract makes explicit the separability of the acts of Miller and Cities Service. It does not completely negate the concurrence of the two acts to cause a single wrong, and it does not therefore manifest a separate and independent cause of action within the meaning of Section 1441(c)".

In *Gray* v. *New Mexico Military Institute*, 249 F. 2d 28 (10th Cir. 1957), the court held that a damage action for personal injuries containing one count against two resident defendants predicated on negligence and a second count against a non-resident defendant insurance company predicated upon an alleged breach of a contract of insurance of which the plaintiff was averred to be a third party beneficiary did not state separate and independent claims or causes of action because:

> "A pleading which alleges but one wrong, for which single relief is sought, cannot constitute a separate and independent claim, no matter how many defendants are said to be liable therefor, or how diverse their basis of liability".

The majority opinion in the present case seems clearly contrary, at least in principle, to all of these prior decisions of the United States Court of Appeals for the Tenth Circuit.

Furthermore, the majority opinion in this case seems to be in clear conflict with the decision of the United States Court of Appeals for the First Circuit in *Charles Dowd Box Co.* v. *Fireman's Fund Insurance Co.*, 303 F. 2d 57 (1st Cir. 1962), in which an action against 39 insurance companies in 61 counts, each based on either a separate fire insurance policy or a separate business interruption policy, was held not to state separate and independent claims or causes of action because the claims were all the result of the total injury to plaintiffs' property resulting from two fires which occurred five days apart. The opinion states in part:

> "The plaintiffs' claims against the several insurance company defendants are separate and independent in the sense that each claim against each insurance company is under a separate policy independently negotiated. * * *"

After discussing and quoting from the *Finn* case, the opinion continues:

> "In the case at bar the plaintiff suffered a single loss. The two fires five days apart are, of course, to be treated for present purposes as one and the wrong alleged is the defendants' failure to pay compensation for it, which is the same wrong alleged by the plaintiff in the Finn case. * * * Moreover the plaintiffs' transactions with the insurance company defendants in this case are more 'interlocked' than in Finn. In fact the transactions in the case at bar are not only interlocked but interwoven by reason of the identical pro-rata and co-insurance clauses" (303 F. 2d 60, 61).

The only predicate the majority opinion in the instant case has for holding the cause of action against each respondent to be separate and independent is that each claim is under a "separate" purchase order or subcontract "in-

dependently negotiated" just as was the case with the 61 separate and independent insurance policies sued upon in the *Dowd Box* case. In the case at bar, as in that case, the petitioner suffered a single loss, i.e., $3,600,000 damages because of a totally inoperable plant that would not produce the products for which it was intended. Under petitioner's pleadings, the defaults of each respondent contributed to the single loss and the performance of each respondent was interlocked and interwoven through purchase orders or subcontracts with Braun for integral, interlocked, and interwoven parts of a single integrated plant. Here, as there, the respondents other than Braun are liable for part, but not all, of the total damages flowing from the single injury. The two cases are in clear conflict at least in reasoning and principle.

IV.

Construing 28 U.S.C. § 1441(c) To Permit Removal Of Separate And Independent Causes Of Action In Absence Of Complete Diversity Of Citizenship Of Doubtful Constitutionality.

Even if the cause of action against the Respondents Braun and Thermal could properly be held to be separate and independent from the cause of action against Braun and the other respondents, its removal from the state court to the federal court would be of doubtful constitutionality because of the absence of complete diversity of citizenship. Some leading authorities have expressed grave doubts about the constitutionality of Section 1441(c) to the extent that it permits such removals, Wright, *Federal Courts* § 39, Cohen, *Problems in the Removal of a "Separate or Independent Claim or Cause of Action"*, 46 Minn. L. Rev. 1, while others flatly conclude that the statute is unconstitutional under Article III, Section 2, of the Constitution of

the United States, when so construed and applied, Lewin, 66 Harv. L. Rev. 423.

Wright states at page 117:

> "Only a handful of cases have been removed under § 1441(c) since the Supreme Court construed it in the Finn case, and a strong argument can be made that in permitting removal in those cases the district courts applied the statute erroneously, or that the removal was unconstitutional.
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> * * *
>
> "Few, if any, diversity cases can properly be removed under this statute in the light of the construction placed on it in the Finn case. Writing in 1961, Professor Cohen listed 24 such cases in which removal had been permitted but noted that there is substantial doubt as to the propriety of removal, evidenced by other cases denying removal in similar circumstances, and many of those cases."

Wright points out that the prior removal of "closely related" but separable controversies could be sustained on the ground of an ancillary or pendent jurisdiction over the closely related controversy as to which diversity of citizenship was absent but that such a ground is "hardly available under § 1441(c), where the criterion for removal is that the claims are entirely unrelated". He then concludes at page 119 that the statute "if read literally, certainly means that there will be some cases where a federal court will have jurisdiction of a non-federal claim, though diversity is absent and though the claim bears no relation to any federal claim in the case. This poses a serious constitutional question".

The Court of Appeals for the Fifth Circuit has expressed doubt as to whether § 1141(c), so construed and applied, is constitutional, *Finn* v. *American Fire & Casualty Company,*

207 F. 2d 113, 116 (5th Cir., 1953). The Court of Appeals for the First Circuit in *Charles Dowd Box Co., Inc.* v. *Fireman's Fund Insurance Co.*, 303 F. 2d 57, 61 (1st Cir., 1962), stated that one of the considerations supporting its decision that "separate and independent" claims or causes of action were not present was that "our conclusion avoids coming to grips with the argument, made by Lewin in the Harv. L. Rev. article cited above, that Section 1441(c) exceeds the constitutional limitation on the jurisdiction of the federal courts in both federal question and diversity cases."

The same considerations are equally applicable here. It is admitted that all of the respondents in this case are properly joined as defendants. Wright at page 118 states that proper joinder rules out the presence of "separate and independent" causes of action, stating:

> "The relation which the joinder of parties rules require is just the kind of relation which, according to the Finn case, bars resort to Section 1441(c)."

The adoption of Wright's criterion for removal under § 1441(c) that the claims must be "entirely unrelated" prevents the constitutional issue from ever being reached. It cannot be seriously contended that the claims against the various respondents in this case are "entirely unrelated". If it was so concluded, the removal of the action against Braun and Thermal in the absence of complete diversity of citizenship would probably be unconstitutional.

V.

Whether The Removal Bond Of A Single Defendant Can Effect Removal For Multiple Co-Defendants Is An Important Federal Statutory Question Which Has Not Been But Should Be Decided By The United States Supreme Court.

Respondent Stephens-Adamson Co. alone executed and filed a removal bond which in the first line thereof named Stephens-Adamson Mfg. Co. alone as principal (Tr. 25-26). The purported joinder of the other respondents in the removal bond was in no way approved, ratified, or agreed to by the surety on the removal bond (Tr. 32-33). The other respondents did not undertake to become additional principals to the removal bond until December 3, 1965, and the surety company in no way ratified or agreed to their becoming such principals until that date, when the rider to the removal bond was filed (Tr. 36), long subsequent to the expiration of the statutory 20-day period during which petition and bond for removal must be filed.

The majority opinion nevertheless holds the bond to be sufficient to effect removal for all respondents simply because the word "petitioners" is used in one point in the bond even though it is clear from the first line in the bond and from the execution thereof (Tr. 25-26) that only Stephens-Adamson Mfg. Co. is a principal to the bond. The word "Principals" also appears at the end of the bond under the signature of the single principal. The obviously inadvertent and inaccurate use of the words "Petitioners" and "Principals" when on the face of the instrument there is only one is a farfetched and feeble point indeed upon which to hang the holding.

It is well established that *all* defendants must join in the removal. 28 U.S.C. § 1441(a); *Gableman* v. *Peoria D. & E. R.R.*, 179 U.S. 335 (1900); *Chicago, R.I. & P. R.R.* v. *Martin*, 178 U.S. 245 (1900). At the time of this attempted removal 28 U.S.C. § 1446(b) required that a petition for removal be filed within 20 days after service of complaint or summons. This 20-day time period is mandatory and jurisdictional. 1 *Barron & Holtzoff, Federal Practice & Procedure*, § 107 (Wright ed. 1963). 28 U.S.C. § 1446(d) makes it mandatory that "each petition for removal" of a case from the state court to the United States District Court "shall be accompanied by a bond with good and sufficient surety" and such bond must be "conditioned that the defendant *or defendants* will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed". It has been held that filing of the bond "within the time limited for removal" along with the removal petition "is essential to 'effect the removal' ". *Nelson* v. *Peter Kiewit Sons Co.*, 130 F. Supp. 59 (D.N.J. 1955); *Richlin Advertising Corp.* v. *Central Florida Broadcasting Co.*, 122 F. Supp. 507 (S.D.N.Y. 1954). Hence, it clearly appears that the filing of the rider to the removal bond in which the other respondents for the first time became principals upon the removal bond and in which the surety company for the first time agreed to their being principals was totally ineffectual since it came long after the expiration of the 20-day statutory period and after hearing on petitioner's motion to remand the case to the state court.

The purported joinder by the other respondents in the removal bond of Stephens-Adamson Mfg. Co., to which the surety company did not assent until more than 60 days later, either was totally ineffectual to make the other re-

spondents parties principal to this removal bond or, if it was effectual, under universally recognized principles of the law of suretyship it discharged the surety on the bond by reason of the addition of further principals without its assent. *Annot., "Liability of Surety"*, 144 ALR at 1267 (1943); *Williston, Treatise on Contracts*, § 1240 at 3552-53; *O'Neal* v. *Long*, 4 Cranch 60, 2 L. Ed. 550 (1807); *Anderson* v. *Bellinger*, 87 Ala. 334, 6 So. 82 (1889). In either event the respondents other than Stephens-Adamson Mfg. Co. had no removal bond during the 20-day statutory period and for more than 60 days thereafter because either a bond on which they are not principals or a bond from which the surety has been discharged by their addition as principals is the equivalent of no bond.

The United States Supreme Court has not decided the question of whether a removal bond perfected by a single defendant as principal can effect the removal for other defendants who have no removal bond during the statutory period. No previous case has ever construed 28 U.S.C. § 1446(d) as requiring a removal bond from only one defendant among multiple defendants. The question is certainly an important question of federal law and of federal statutory construction as it involves a significant point of federal procedure and a substantial question as to the jurisdiction of the federal courts. This is particularly true in view of the general rule that removal procedures must be strictly followed in cases based upon diversity because it is the policy of the federal courts to restrict diversity jurisdiction and to remand doubtful removal cases to the state courts. *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100 (1940); *Wright, Federal Courts*, § 23, at 64-69 (1963); 1 *Barron & Holtzoff, Federal Practice & Procedure*, § 107 (Wright ed. 1963); *Lumbermen's Mutual Cas. Co.* v. *Elbert*, 348 U.S. 48 (1954).

It is respectfully submitted that the petition for writ of certiorari should be granted.

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CERTIFICATE OF SERVICE

Copies of this petition for writ of certiorari have been mailed, properly stamped and addressed, to all of the attorneys of record for the respondents at their addresses of record.

Attorney for Petitioners